

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:

Karen M. Grant,

Debtor. /

Case No. 04-49545-PJS

Chapter 7

Hon. Phillip J. Shefferly

Stuart A. Gold, Trustee,

Plaintiff,

v.

Adv. Pro. No. 04-5097

National City Home Loan Services, Inc.,
a/k/a First Franklin Loan Services,

Defendant. /

**AMENDED OPINION DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S
COUNTER-MOTION FOR SUMMARY JUDGMENT**

I.

The Trustee seeks to avoid Defendant National City Home Loan Services, Inc.'s ("National City") mortgage as a preferential transfer. The Debtor purchased real property located at 1634 Middlesex in Madison Heights. To finance the purchase, she obtained two loans from National City in the amounts of \$93,600 and \$23,900. On December 30, 2003, the Debtor granted two mortgages to National City in the same amounts to secure the repayment of the loans. The sale closed on December 30, 2003. The mortgages were delivered to the Oakland County Register of Deeds on January 15, 2004, sixteen days after the Debtor purchased the property and granted the mortgages.¹ The Oakland County Register of Deeds assigned a liber and page number to the mortgages on February 12, 2004, six weeks after the Debtor purchased

¹ This opinion is amended only to correct the date in this sentence.

the property. The Debtor filed a chapter 7 petition for relief on April 1, 2004.

National City filed a motion for summary judgment based on the safe harbor defense under § 547(c)(3(B)). The Trustee responded by filing a counter-motion for summary judgment. The central issue is when the mortgage should be considered recorded, in order to determine whether it falls within the twenty-day safe harbor of the enabling loan defense.

II.

Section 547(c)(3) provides that

[t]he trustee may not avoid under this section a transfer . . . that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

- (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
- (ii) given by or on behalf of the secured party under such agreement;
- (iii) given to enable the debtor to acquire such property; and
- (iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property

11 U.S.C. § 547(c)(3).

One treatise explained the application of § 547(c)(3) as follows:

The exception protects a transfer of a security interest to secure an “enabling loan.” Thus, if a security transfer is made to secure an enabling loan that, in fact, enables the debtor to acquire that collateral, the transfer is not preferential if perfected within 20 days after the debtor receives possession of such property. The preference issue arises because the loan must be made before debtor acquires rights in the collateral (the loan is to enable debtor to acquire rights). A transfer does not occur until the debtor has rights in the collateral. Thus, in an enabling loan, the transfer is always on account of an antecedent debt.

5 Collier on Bankruptcy ¶ 547.04[3] at 547-66 to -67 (15th ed. rev. 2005) (footnotes omitted).

“Section 547(c)(3) applies to transfers of real as well as personal property.” Id. (footnote omitted); see also Boyd v. Superior Bank FSB (In re Lewis), 270 B.R. 215, 217-18 (Bankr. W.D. Mich. 2001) (J. Stevenson) (applying the defense to a refinancing mortgage); Berquist v. Fidelity Mortgage Decisions Corp. (In re Alexander), 219 B.R. 255, 259-60 (Bankr. D. Minn. 1998) (applying the defense to a purchase money mortgage, although “virtually every case decided under the § 547(c)(3) defense involves personal property”) (citations omitted).

The timing of a preferential transfer is determined by application of § 547(e)(2), which in turn depends on when the transfer is perfected under state law by recording. The Court addressed similar questions of fact and law in its opinion and order issued this same date in Gold v. Interstate Financial Corp., adversary proceeding No. 04-4023. The Court has determined that, applying the same analysis of the Michigan recording statutes and the same standard for summary judgment as it applied in the Gold v. Interstate case, summary judgment cannot be granted in favor of either party in this case.

Therefore, the Court finds that there are genuine issues of material fact, and this case must proceed to trial. Accordingly, the Court DENIES National City’s motion for summary judgment and DENIES the Trustee’s cross-motion for summary judgment. The Court will enter an order consistent with this opinion.

Phillip J. Shefferly
United States Bankruptcy Judge

Dated: August 3, 2005

Service list on page 4.

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